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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ENRIQUE G., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE G.,

Defendant and Appellant.

D051878

(Super. Ct. No. J215662)

APPEAL from an order of the Superior Court of San Diego County, Francis M. Devaney, Judge. Reversed with directions.

Appellant Enrique G., a juvenile, was the subject of a petition filed under the Welfare and Institutions Code section 602. The petition alleged appellant stabbed William Brown in the chest after Brown made a sexual proposition and fled Brown's apartment with Brown's keys, cash and cell phone. Appellant admitted he committed

robbery and assault with a deadly weapon and inflicted great bodily injury and personally used a deadly weapon.

At a dispositional hearing, appellant was committed to the probation department's Breaking Cycles program for a year, followed by a term of probation, including conditions which prevented appellant from having contact with either Brown or gang members.

On appeal appellant contends the trial court's minute order did not accurately reflect the trial court's oral disposition, the condition limiting contact with Brown should be subject to a knowledge qualifier and the gang limitation was ambiguous. We agree the trial court's minute order does not reflect the oral disposition and remand with directions that it conduct further proceedings by which it may express its apparent intent that appellant be subject to the conditions set forth in its minute order. We reject appellant's contention that an express knowledge qualifier is needed for the condition limiting contact with Brown; however, on remand we direct that the trial court define the gang limitation by reference to criminal street gangs as defined in Penal Code section 186.22, subdivisions (e) and (f).

FACTUAL AND PROCEDURAL BACKGROUND

Prior to the disposition hearing, the probation department submitted to the trial court a report which included a recommendation the trial court remand appellant to the department's Breaking Cycles program for a year and impose 58 probation conditions. The department's report was served on appellant's counsel prior to the hearing. Counsel discussed the recommendations with appellant and his parents and made no objection to

the recommendations, but instead stated: "We're submitting on the probations officer's recommendation of Breaking Cycles" Appellant's counsel also advised the court as follows: "It's my understanding the district attorney is going to be requesting that the court consider the California Youth Authority as an option for Enrique. And should that be the case, I would like to address the court further on that recommendation."

The district attorney did in fact request a California Youth Authority (CYA) commitment at the disposition hearing and his request was supported by the victim of the crime, Brown, who advised the court in some detail as to the devastating impact the crime had on him and the harassment he was enduring from people he believed were associates of appellant. At the disposition hearing, the trial court emphasized its belief appellant committed a serious offense which would justify a CYA commitment. "I am very tempted . . . to tell you the truth. Although, I'm not a big fan of CYA to place Enrique there. Only thing that holds me back is his age and the fact that this is his first offense. If Enrique had a previous history in front of me I would have no problem. I've used the expression many times up here. You have to earn your way to CYA. And plunging a knife in some man's chest is pretty good evidence of earning your way to CYA. There is nothing [developmental] about this. There is nothing foolish, immature about it. You used those expressions before; bad judgment, poor decisions. This was an intentional criminal act."

After committing appellant to Breaking Cycles for a year, the trial court stated: "When you're completed with the custody portion of that commitment, Enrique, you will be released to your mom and dad at their address on the following conditions:

"You will attend school. I don't want to hear about truanancies. Don't want to hear about tardiness. Don't want to hear about behavioral issues at school. You will enroll in school. You've proven to me and others that you could get A's and B's. You will get into school as soon as you're out of custody and apply yourself. Get those A's and B's again.

"You will be on a curfew of 6:00 p.m. You're home every night by 6:00 p.m. You're not out of the house any later. No exceptions except for school-related activities or religious activities. If there is any kind of Wednesday night bible study, whatever it is, you may be out at that. You return immediately. But your curfew is 6:00 p.m. Do not be on the streets and get in any further trouble.

"When you complete your custody portion you will do 100 hours of community service. Volunteer your time to a church or another charitable organization. Give them 100 hours of your work.

"You will take an assaultive behavior class and juvenile offender class to help you make better decisions. The offender program, juvenile assaultive behavior class, will hopefully teach you about the use of violence and how inappropriate it is.

"You will have absolutely, positively no contact with Mr. Brown. You make no attempts to contact him. He seems to think you have friends of yours trying to contact him. Better not happen. No contact directly, indirectly, whatsoever, with Mr. Brown.

"You will enroll in and complete counseling. And the family will be part of that counseling. You're ordered to participate at the therapist's direction.

"You will not use drugs or alcohol on probation or any other time. You will be tested on probation. If you test positive you're back in front of me. I may very well send you to CYA. You also enroll and successfully complete a treatment program.

"You will not have any contact, whatsoever, with any known gang members, including Palm City Forever High Group. Whoever they are. Any known gang members. You have nothing to do with them. I don't care if they're your best friends since you're in kindergarten. If you're even seen walking down the street corner talking to them, you're picked up and arrested and brought back in front of me. You know who they are, Enrique. We know who they are. Steer completely clear of all known gang members.

"In addition, I'll also refer Enrique to a mentor program. Big brothers or something similar to assist his family in getting him some guidance and staying away from these temptations on the streets."

The trial court's oral disposition made no express reference to the probation conditions set forth in the probation department's report. The trial court then asked the prosecutor whether he had any other suggested terms of probation. The prosecutor said he did not.

Following pronouncement of its disposition, the trial court signed a minute order. Although the minute order set forth the conditions which were orally pronounced by the trial court, the minute order also incorporated the conditions set forth in the probation department report. For instance, although not orally pronounced by the trial court, the probation department recommended and the minute order required, among other matters,

that: appellant report to his probation officer at such times and places as directed; follow the rules and instructions of the Probation Officer; obey all federal, state, county and city laws; not enter Mexico; submit to civil process and pay any judgment; and not come within 300 feet of the victim or his residence. The probation report and minute order also contained more extensive restrictions on any gang activity than the trial court pronounced at the disposition hearing, including wearing of gang clothing or paraphernalia or use of gang signals.

DISCUSSION

I

In his first argument on appeal, appellant argues we should strike from the minute order all the conditions which were not orally pronounced at the disposition hearing. We decline to do so.

We agree with appellant that where there is a conflict between the oral pronouncement of a sentence and a later entered minute order, the oral pronouncement controls. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Price* (2004) 120 Cal.App.4th 224, 242.) We also agree with appellant that here the minute order contains a number of conditions which were not orally pronounced or otherwise expressly made a part of the trial court's disposition. However, contrary to appellant's argument, we do not believe striking the conditions which appear only in the minute order is an appropriate remedy for this defect in the record.

Our review of the record convinces us the trial court intended, and the parties expected, that appellant would be subject to all the conditions set forth in the probation

department's report and reflected in the minute order. In particular, counsel for appellant did not dispute any of the conditions recommended by the department but instead was plainly relieved that, notwithstanding the seriousness of his client's offense, the probation department did not recommend a CYA commitment. In light of the district attorney's argument in favor of a CYA commitment, the victim's detailed statement and the trial court's serious consideration of a CYA commitment, counsel's acquiescence in the conditions recommended by the probation department is readily understandable. Thus the failure of the trial court to expressly impose the recommended conditions of probation appear to have been a simple oversight on the part of the trial court, which the trial court can readily remedy on remand by modifying the terms of probation to expressly include the conditions set forth in the probation report. (See *In re Frankie J.* (1988) 198 Cal.App.3d 1149, 1154 [conditions may be imposed by simple reference to a probation department document]; Welf. & Inst. Code, § 775 ["Any order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article"].)

II

Appellant argues the condition limiting his contact with the victim should be modified so that only *knowing* contact with the victim is a condition of probation. Admittedly, an express knowledge qualifier is required to prevent vagueness with respect to limitations on gang associations. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) Here however, appellant plainly knows who the victim of his crime was and where he

lived at the time of the offense. Thus an express knowledge qualifier is not required here to make the condition definite enough to avoid any inadvertent violation. Nonetheless, on remand appellant may request from the trial court a clarification of this probation condition.

III

Both the trial court's oral disposition and the minute order prevented appellant from associating with known gang members. On appeal appellant contends the term "gang" is ambiguous. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 634-635, 638.) Appellant's contention has some merit. (*Ibid.*) However, courts have found that implicit in a sentencing court's use of the term "gang" is the definition of "criminal street gangs" set forth in Penal Code section 186.22, subdivisions (e) and (f), and reference to the statutory definition makes such a probation condition enforceable. (*In re Justin S.*, *supra*, 93 Cal.App.4th at 816, fn. 3; see also *People v. Lopez*, *supra*, 66 Cal.App.4th at pp. 634-635, 638.) Thus on remand the trial court is directed to, among other matters, define "gang" by reference to Penal Code section 186.22, subdivisions (e) and (f). (See *People v. Lopez*, *supra*, 66 Cal.App.4th at p. 638.)

DISPOSITION

The trial court's order imposing probation conditions is reversed and remanded with instructions that the trial court expressly incorporate in its oral disposition the probation conditions set forth in the probation department report, if the trial court intended to impose those conditions. The trial court is further instructed to amend

any gang limitations by reference to Penal Code section 186.22, subdivisions (e) & (f),
and to enter a minute order which conforms with its oral disposition.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.